88-775

No.

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

GEORGE KELLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

— AND APPENDIX —

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS' OPINION CONFLICTED WITH THIS COURT'S RULING IN *KOTTEAKOS v. UNITED STATES*, 328 U.S. 750 (1946), AND THE DECISIONS OF OTHER APPELLATE COURTS, IN HOLDING THAT ONE PERSON'S INVOLVEMENT IN SEVERAL SIMILAR, BUT INDEPENDENT, CRIMINAL ENDEAVORS WAS SUFFICIENT TO ESTABLISH A SINGLE CONSPIRACY.

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The Petitioner, GEORGE KELLEY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming Petitioner's conviction (App. A, *infra*, A-1–A-9) is reported at 849 F.2d 999. The order denying rehearing (App. B, *infra*, B-1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1988. (App. A, *infra*, A-1). A petition for rehearing was denied on August 30, 1988. (App. B, *infra*, B-1). This petition is being filed within sixty (60) days of that date as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

1. Petitioner was arrested on December 18, 1984 at his residence after agents had attempted a "controlled delivery" of narcotics. This "controlled delivery" followed the seizure of narcotics in Bangkok, Thailand, and the subsequent arrest of, and agreement to cooperate from, Woodrow Wilson in San Francisco.

The arrest of Petitioner occurred after Wilson had entered his apartment to attempt a "controlled delivery" of packages containing "sham" heroin and after Petitioner had broken a window in his apartment and thrown Wilson's packages out.

2. An Indictment was returned in the Eastern District of Michigan against Petitioner and five others on May 6, 1986.

Petitioner was named in seven of the 13 counts contained in the Indictment. Count One charged Petitioner, Marian Lavern Lampkin, Burrell Pace Burton a/k/a Michael Kelley, Albert Charles Lewis, Terrence Bernard Wakefield, and "Robert LNU" with a conspiracy to possess with intent to distribute, and to distribute, heroin from "on or about January, 1983 . . . up to an including February, 1985" in violation of 21 U.S.C. Sections 841 and 846. Count Two alleged a conspiracy to import heroin from "in or about February, 1983 . . . up to and including February, 1985" between Petitioner, Lampkin, Lewis, Wakefield and "Robert LNU", in violation of 21 U.S.C. Sections 963 and 960. In Count Three, Lampkin was accused of aiding and abetting Petitioner in the possession with intent to distribute heroin, in violation of 21 U.S.C. Section 841 (a) and 18 U.S.C. Section 2. Counts Six and Seven charged Lampkin and Petitioner with aiding and abetting the interstate travel with the intent to carry on an unlawful activity, in violation of 18 U.S.C. Sections 1952 and 2, on or about November 21, 1984 (Count Six) and December 14, 1984 (Count Seven). In Count Eight, Petitioner was charged with carrying a firearm during and in relation to a federal crime of violence, in violation of 18 U.S.C. Section 924 (c). In Count

Twelve, the government sought to forfeit a building ("The Fill Building"), a vehicle owned by Petitioner, and a vehicle owned by Lampkin, pursuant to 21 U.S.C. Section 853 as having been used or intended to be used to facilitate or commit a narcotics felony.

3. Petitioner, along with co-defendant Burrell Pace Burton a/k/a Michael Kelley, was tried before the Honorable George E. Woods, and a jury, beginning November 17, 1986.

4. Evidence introduced at Petitioner's trial established that a large quantity of heroin was given to the Drug Enforcement Administration in Bangkok, Thailand, by an informant. The heroin was subsequently taken to San Francisco where an undercover agent made a "controlled delivery" to Woodrow Wilson. After his arrest, Wilson agreed to cooperate with the agents. Wilson subsequently attempted a "controlled delivery" of "sham" heroin to Petitioner at his residence, in the Fill Building, in Detroit.

The case against Petitioner relied upon a highly questionable interpretation of a conversation between Petitioner and Wilson, (T. 365–367: G.Ex. 27-A; T. 926: Kelley), the attempted "controlled delivery" of narcotics to Petitioner that ended when Petitioner broke a window and threw the packages from his residence (T. 898–899, 922: Kelley), and the testimony of Wilson, an admitted drug dealer and user who had been paid approximately $50,000 by the Government and who had abundant reason to tailor his testimony to the Government's theory. (T. 221–222, 226–227: Wilson; T. 549–551, 575: Kusen)

5. Additionally, the government was permitted to introduce extensive evidence regarding the "Washington, D.C. deal" and the "Los Angeles deal". Evidence established that a large quantity of heroin was seized in Seattle, Washington, in November, 1983. This subsequently led to arrests in Washington, D.C. Another large shipment was seized in Los Angeles in January, 1985. Petitioner objected to the irrelevent and highly prejudicial testimony allowed regarding the

"Washington, D.C. deal" and the "Los Angeles deal". Motions to strike this testimony were made by counsel. (T. 733–734, 790, 827) A continuing objection was permitted. (T. 751)

6. Petitioner was convicted of the charges contained in Counts One, Two, Three, Six and Seven by a jury verdict returned on November 21, 1986. Co-Defendant Burton was acquitted on Count One, the only charge against him.

Petitioner was sentenced by Judge Woods on February 24, 1987. He received the following sentences: On Count One, 15 years custody plus a $20,000 committed fine; on Count Two, 15 years custody, concurrent to Count One, plus a $20,000 committed fine; on Count Three, 15 years custody, concurrent to Count One, plus a $20,000 committed fine with three years special parole; on Count Six, 5 years custody, concurrent to Count One, plus a $10,000 committed fine; on Count Seven, 5 years custody, concurrent to Count One, plus a $10,000 committed fine.

REASONS FOR GRANTING THE PETITION

1. This case presents an important question concerning the amount of evidence required to establish that several transactions are part of a single conspiracy. It also raises, however, a larger question concerning the right of a citizen to a fair trial. Does "[g]uilt with us remain[ ] individual and personal, even as respect to conspiracies" as the Court proclaimed in *Kotteakos v. United States*, 328 U.S. 750, 772 (1946). Or has the pervasiveness of crime, in general, and the drug epidemic, in particular, become so widespread and all-engulfing that the notion of individual guilt must be discarded.

Petitioner was convicted after a trial that contained only weak and contradicted evidence of his own guilt. What the evidence did show in abundance, however, were other drug transactions that Petitioner had, by even the Government's admission in the appellate court, absolutely no involvement

in. The admission of this evidence was highly prejudicial and unwarranted under existing conspiracy law. It denied Petitioner a fair trial.

2. There was evidence at Petitioner's trial of three separate narcotics transactions, i.e., the "Washington, D.C. deal", the "San Francisco deal" and the "Los Angeles deal".

There was evidence as to Petitioner only with respect to the "San Francisco deal". The court of appeals opinion, *infra*, A-3–A-5, recites the evidence against Petitioner, in the light most favorable to the Government. This evidence consisted primarily of the testimony of Woodrow Wilson, a convicted felon, drug user and dealer who was paid handsomely for his assistance to the Government. (T. 549–551, 575: Kusen) Wilson's testimony was contradicted by the testimony of Petitioner, the testimony of Petitioner's son, Burrell Burton, and tape recorded evidence.

3. Much of the evidence at Petitioner's trial was about the "Washington, D.C. deal" and the "Los Angeles deal".

The "Washington, D.C. deal" began with the seizure of heroin in Seattle, Washington, in November, 1983. (T. 748–750: Ury) Annie Lewis and her son were eventually arrested in Washington, D.C. during a "controlled delivery of the heroin. (T. 767–768: Brown) Evidence suggested that Marian Lampkin, a roommate of Lewis at the time, was also involved in the attempt to import this heroin. (T. 553–554: Kusen; T. 266: Wilson)

The "Los Angeles deal" occurred after the "San Francisco deal". Woodrow Wilson worked with the Government in helping to seize the heroin and arrest the importers. Marian Lampkin had refused to participate in this deal and, indeed had refused to make any payments for the heroin received during the "San Francisco deal". (T. 215–216: Wilson)

The evidence showed three separate transactions with Marian Lampkin as the only alleged "co-conspirator" who was involved in more than one transaction. There was no evidence that the source of the narcotics or the couriers were the same in

any two transactions. There was no evidence that any "co-conspirator",[1] other than Marian Lampkin, participated in more than one transaction, had knowledge of more than one transaction, or entered into any conspiratorial agreement that encompassed more than one transaction.

4. The court of appeals opinion found a single conspiracy existed, noting that "[s]eemingly independent transactions may be revealed as parts of a single conspiracy by their place in a pattern of regularized activity involving a significant continuity of membership." *Infra*, A-7, quoting *United States v. Grassi*, 616 F.2d 1295, 1302 (5th Cir. 1980). Here, however, there was no "significant continuity of membership." The only "member" who was arguably a participant in more than one transaction was Marian Lampkin.

The leading case in this area is *Kotteakos v. United States*, 328 U.S. 750 (1946). The indictment in *Kotteakos* alleged that 32 defendants conspired to obtain loans, that would be offered to the Federal Housing Administration for insurance, through applications that contained false and fraudulent information. Simon Brown was the common and key figure in all the transactions. The evidence, however, disclosed that many of the defendants had no relationship to one another, other than Brown's connection with each transaction. There appeared to be at least eight independent groups, none of whom had any connection with each other except that they all dealt independently with Brown as their agent in obtaining loans. Under these facts, the Government admitted, and this Court found, that there was a variance between the proofs — showing at least eight conspiracies — and the single conspiracy alleged in the indictment.

Unless it is no longer valid caselaw, *Kotteakos* makes clear that the involvement of one person in several similar crim-

[1] Woodrow Wilson was arrested during the "San Francisco deal" and began cooperating with the Government. He worked exclusively for the Government during the "Los Angeles deal". During this transaction, he was no longer a "co-conspirator". See *United States v. Escobar DeBright*, 742 F.2d 1196, 1198 (9th Cir. 1984); *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965).

inal endeavors does not transform several independent conspiracies into one central conspiracy. The existence of "separate adventures of like character" does not establish one conspiracy.

5. The court of appeals opinion cites no cases, nor is Petitioner aware of any, where a single conspiracy has been found upon evidence that one "co-conspirator" was involved in several similar illegal transactions or endeavors.

The question is normally whether evidence of several common members in similar endeavors is enough to establish one conspiracy. Thus,for example, the Eighth Circuit in *United States v. Snider*, 720 F.2d 985 (8th Cir. 1983) held that a variance between the single conspiracy charged and the proof at trial existed where two marijuana farm growing operations were alleged as a single conspiracy even though there were three common members in the similar operations.

In *Snider, supra*, the Eighth Circuit stated that "[t]he government proved two similarly motivated but distinct conspiracies" and that "mere knowledge of another similarly motivated conspiracy or an overlap in personnel do not prove one overall agreement." *Id.* at 988. See also, *United States v. Camiel*, 689 F.2d 31 (3rd Cir. 1982). Here, of course, the "overlap of personnel" consisted of one "co-conspirator" and there was no proof of any knowledge by Petitioner of the other transactions.

6. The court of appeals opinion states that the question of whether single or multiple conspiracies has been shown is usually a question of fact to be resolved by the jury. *Infra*, A-6. Here, however,there was not sufficient evidence for this question to go to the jury. Even if there had been sufficient evidence, the jury here was never instructed to determine whether single or multiple conspiracies had been shown. The trial court's instructions to the jury in this case directed them to consider only whether the Petitioner was a member of the conspiracy, not whether single or multiple conspiracies had been shown.

7. The case against Petitioner was not a strong one. It relied upon a highly questionable interpretation of a conversation between Petitioner and the informant (T. 365–367: G.Ex. 27-A; T. 926: Kelley), an attempted "controlled delivery" of narcotics to Petitioner that ended when Petitioner broke a window and threw the packages from his residence before any entry by police (T. 898–899, 922: Kelley; Gov't Ex. 50-D), and the testimony of the informant, an admitted drug dealer and user who had abundant reason to tailor his testimony to the Government's theory. (T. 221–222, 226–227: Wilson; T. 549–551, 575: Kusen)

8. Much of the testimony and physical evidence related solely to the "Washington, D.C. deal" and the "Los Angeles deal". The order in which the evidence was offered tended to be overlapping and confusing.[2] The impression created for the jury was that a huge amount of heroin was involved in various transactions and Petitioner was apparently involved.

Evidence that was prejudicial, and not very probative, was introduced against Petitioner because of his alleged involvement in the "San Francisco deal". In particular, the Government introduced 8½ kilograms of heroin, with an estimated street value of $20.6 million (T. 792, 804: King), that had been seized in Bangkok, Thailand. However, the prejudice that resulted from such a huge quantity of narcotics being displayed before the jury was not sufficient for the Government. The Government introduced 5 kilograms of heroin, with a street value of $14.3 million (T. 805: *Id.*), that was seized in the "Los Angeles deal". Also introduced was 10½ kilograms of heroin, with a street value of $27 million (T. 803: *Id.*), seized in the "Washington, D.C. deal". The sight of these huge quantities of heroin on the prosecution's table,

[2] The order of the Government's witnesses, and the "deal" their testimony was relevant to, was as follows: Tomanio (S.F.); Bancroft (S.F.); Choy (S.F.); Wilson (S.F., D.C., L.A.); Kusen (S.F., D.C., L.A.); Halkides (S.F.); Schmidtke (S.F.); Gutz (S.F.); Green (S.F.); Grabowski (S.F.); Gilbert (S.F.); Gaetz (S.F.); Cox (S.F.); Danilevicius (S.F.); Turner (L.A.); Aiu (L.A.); Bareng (L.A.); Ury (D.C.); Dreisbach (D.C.); Brown (D.C.); Sabonis (S.F.); Barba (D.C.); Davidson (D.C.); Corgen (S.F.); Clark (L.A.); King (S.F., D.C., L.A.); Barenie (S.F.).

and the testimony regarding their values, was in and of itself so prejudicial as to require reversal.

The prejudice, of course, did not end with the physical presence of the heroin and the testimony regarding its worth.

Prejudice was created by the lumping of the three transactions by the Government. Such prejudice is probably inherent when the Government alleges a single conspiracy and is permitted to introduce evidence of all the transactions. It was emphasized here, however, where the Government told the jury they would hear about the "three transactions" of the "Lampkin-Kelley organization".[3] (T. 99–100: Opening Statement of Mr. Pratt)

In *United States v. Samuels*, 741 F.2d 570 (3rd Cir. 1984), the Third Circuit noted the "tendency in conspiracy cases for finders-of-fact to believe that a defendant must have been involved in the conspiracy, once evidence has been presented of some questionable acts the prosecution contends are but an extension of the larger conspiracy." *Id.* at 574–575. This tendency was certainly more likely here where the Government labeled the alleged conspiracy after Petitioner, *i.e.*, the "Lampkin-Kelley organization," and suggested this organization was responsible for the three transactions.

In *Kotteakos*, the Court discussed the problem of transferring guilt from one alleged co-conspirator to another: "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place." *Kotteakos v. United States*, *supra* at 774.

9. The potential for injustice inherent in conspiracy prosecutions has long been recognized. Some 60 years ago, Judge

[3] The Government attorney stated:

> The evidence will show that the Lampkin-Kelley organization, like all drug organizations, in each of these three transactions we are talking about used two things: codes and couriers and I would like to explain what the Government's evidence so far as the codes is going to show in this case . . . (T. 99–100)

Learned Hand called conspiracy "the darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2nd Cir. 1925). More than 50 years ago, the Conference of Senior Circuit Judges, presiding over by Chief Justice Taft, condemned the prevalent use of conspiracy charges brought "for the purpose — or at least with the effect — of bringing in much improper evidence", and emphasized that "the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Report of the Attorney General for 1925, p.5–6.

Justice Jackson noted, with respect to conspiracy law, that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought whenever it is sought to extend the doctrine to meet the exigencies of a particular case." *Krulewitch v. United States*, 336 U.S. 448–449 (1949) (Jackson, J., concurring). More recently, Judge Vance of the Fifth Circuit noted that "the potential for injustice in conspiracy cases is enormous. The prosecutor's net may well ensnare the innocent as well as the guilty. The presentation of evidence in such cases is sometimes almost chaotic . . ." *United States v. Alvarez*, 625 F.2d 1196 (5th Cir. 1980) (J. Vance, dissenting).

This Court has also shown an awareness of the potential for abuse in conspiracy cases. The Court has unanimously proclaimed that it "will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404 (1957).

This case demands implementation of the Court's promise that a fair trial will not be denied to a defendant because a conspiracy is alleged.

This case should have been a relatively simple one for a jury to consider. It was, to a large extent, a question of the credibility of Wilson vs. the credibility of Petitioner. Instead, it became a case of numerous transactions, huge narcotics

busts, undercover agents, and tape recorded conversations. The overwhelming majority of the evidence had nothing to do with Petitioner or even with the criminal endeavor he allegedly participated in. It served only to place an aura of big drug dealing around Petitioner and obscure the jury's consideration of the real issues.

10. Certiorari should be granted to review the court of appeals decision. It conflicts with this Court's opinion in *Kotteakos* and expands the concept of a central conspiracy beyond that previously found by any other appellate court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 28, 1988

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-1262

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE KELLEY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 14, 1988

Before: KEITH and WELLFORD, Circuit Judges; and HULL,* District Judge.

KEITH, Circuit Judge. Defendant, George Kelley, appeals from his conviction after jury trial of conspiracy to possess, with the intent to distribute, heroin, 21 U.S.C. §§ 846 and 841(a)(1); conspiracy to import heroin, 21 U.S.C. §§ 963 and 960; possession, with the intent to distribute, heroin, 21 U.S.C. § 841(a)(1); and two counts of aiding and abetting

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* Honorable Thomas G. Hull, Chief Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

interstate travel to carry on an unlawful activity 18 U.S.C. §§ 1952 and 2.[1] For the following reasons, we AFFIRM.

I.

The evidence adduced at trial revealed the existence of a heroin smuggling and distribution ring, engaged in the transportation of heroin from Thailand for sale in the United States. The membership of the enterprise changed over its life, a fact of some importance to this appeal; however,the principal figure, Marian Lavern Lampkin, was an active participant throughout its existence.[2]

Lampkin became involved in the heroin trade as early as January, 1983, prior to Kelley's participation, which began in November, 1984. Lampkin became involved in the enterprise through her acquaintance with two Americans imprisoned in Thailand after narcotics convictions. Lampkin's role in the operation was two-fold: (1) the recruitment of couriers in the United States to receive Thai heroin from trans-Pacific couriers and deliver the heroin to domestic distributors; and (2) the arrangement of financing in the United States to purchase heroin from sources in Thailand.

A. *The "Washington, D.C. Deal"*

Lampkin's participation in the conspiracy was revealed as a result of the seizure of ten and one-half kilograms of heroin by United States Customs Service agents, and the arrest of one Dr. Charlerm Chantrasook on November 9, 1983, in Seattle, Washington. Drug Enforcement Administration (DEA) agents secured the cooperation of Dr. Chantrasook, who

[1] In Count XII of the indictment, the Government sought to forfeit the Fill Building, which was owned by Kelley, and twop vehicles owned by Kelley and Lampkin, pursuant to 21 U.S.C. § 853. The parties stipulated at trial to having the district court determine Count XII as it pertained to Kelley. On February 20, 1987, the district court ordered that both the building and the vehicles be forfeited.

[2] Lampkin was indicted along with Kelley, and her prosecution was severed from that of Kelley. After she failed to appear for trial, she was convicted in *absentia*.

told them that the heroin was destined for an individual named "Dave" residing in Washington, D.C., and who agreed to make a controlled delivery of sham heroin to "Dave." After his arrival in Washington, D.C., Dr. Chantrasook told the DEA agents that, in fact, his instructions were to make a telephone call to an Anne Lewis in Detroit.

Upon the urging of the DEA agents, Dr. Chantrasook called Lewis and made arrangements for her and her son, Cleophus, to come to Washington, D.C., and for Anne Lewis to meet him in a hotel room which had been wired for surveillance. During that meeting, on November 11, 1983, Lewis told Dr. Chantrasook that she had brought $120,000.00, and that she would take the heroin with her, return to her hotel room, and bring the money back to him. Upon leaving Dr. Chantrasook's room with the sham heroin, Anne and Cleophus Lewis were arrested. Subsequently, on November 13 or 14, a warrant to search a Detroit apartment shared by Lewis and Marian Lampkin was executed, and $37,000.00 was recovered, including $7,800.00 from Lampkin's purse. Both Anne and Cleophus Lewis entered pleas of guilty and were sentenced to ten and eight years, respectively.

B. The "San Francisco Deal"

In early November of 1984, Marian Lampkin travelled to Bangkok, Thailand. Upon her return, she spoke with Woodrow Wilson, who testified that she told him that she had given his phone number to some people there that would give him information about heroin, which she referred to as "tea." Wilson testified that he did, in fact, receive a telephone call from an individual identifying himself as "Wong Sun," and who, after confirming that Wilson knew Lampkin, indicated that he was in San Francisco with the "tea." Wilson then made plans to go to San Francisco to pick up the "tea." Kelley paid for the airline ticket and gave Wilson money for his expenses.

Upon Wilson's arrival in San Francisco, he attempted to contact the courier Wong Sun,but was unsuccessful. Wilson then called Kelley, who told him "to stay out there for another day or so, maybe something would happen and he would show up." However, the courier did not appear. When Wilson ran out of money, he returned to Detroit.

Approximately two weeks later, Wilson received another telephone call, which he believed was made by another Thai courier. In fact, DEA agents had intercepted written instructions in Bangkok for another delivery, along with approximately eight-and-one-half kilograms of heroin, and had substituted a DEA agent for the courier. As a result of that conversation, Wilson, Lampkin and Kelley met at the Fill Building in Detroit, which Kelley owned and where he maintained his residence.[3] Wilson testified that, at that meeting, the parties had agreed to use "music terms" connected with the recording industry when talking about heroin trafficking on the telephone.[4] In addition, Wilson informed the others that he had received a call from the "courier," who wanted $10,000.00 for the "package."

At a second meeting, at which Wilson, Lampkin, Kelley and Kelley's son, Michael, were present, it was agreed that Kelley would supply the $10,000.00 which the "courier" had requested for the heroin. After obtaining the money, Wilson flew to San Francisco, where he arrived either late on the night of December 14 or in the early morning hours of December 15. That morning, Wilson met with the "courier," gave her the $10,000.00, took possession of the heroin, and was arrested. Upon his arrest, Wilson was persuaded to cooperate in a controlled delivery, and told Lampkin in a telephone call that "the session went off beautiful."

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[3]Kelley testified that he had become a co-partner in a corporation, Future Development Corporation, with Lampkin, and the offices of that organization were located in the Fill Building.

[4]Wilson had been involved in the recording business in the 1970's. Also, Lampkin had played in recording sessions with Wilson's recording company in the 1960's as a pianist.

The DEA agents then planned a delivery of sham heroin to the Fill Building in accordance with the existing plan. On December 18, Wilson, at the direction of the DEA agents, went to Kelley's apartment with two suitcases of sham heroin. When the agents, bearing search warrants, entered the first floor of the building amid shouts of "police", Kelley jumped up, broke out a window with an iron, and threw packages of the "heroin" out the window, cutting his finger in the process. Wilson kicked a remaining package under Kelley's bed, from where it was recovered.

C. The "Los Angeles Deal"

Approximately one month after the controlled delivery at the Fill Building, Wilson received another call from a courier in Las Vegas who identified himself as "Chan Y." As in the "San Francisco deal," the caller told Wilson that he had received Wilson's number from Lampkin. Chan Y told Wilson that he had more than one-hundred grams of "tea" in Los Angeles, and that he would have to check with someone else concerning more. Two weeks later, Wilson received a call at the same number from another courier in Los Angeles, and arrangements were made for Wilson to go to Los Angeles to pick up a shipment. After that transaction, in which an agent participated in an undercover capacity, two couriers were arrested and approximately five kilograms of heroin were seized.

II.

Kelley's primary argument on appeal is that the evidence presented by the government at trial can be reasonably construed only as supporting a finding of multiple conspiracies. Because the indictments charged that Kelley was a member of one central conspiracy, Kelley asserts that the proofs at trial were at variance with the indictment, resulting in prejudice to Kelley and requiring reversal under *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

In order to obtain a reversal due to a variance between the indictment and the evidence, a two-prong test must be satisfied: (1) the variance itself must be demonstrated; and (2) the variance must affect some substantial right of the defendant. *United States v. Grassi*, 616 F.2d 1295, 1302 (5th Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States v. Grunsfeld*, 558 F.2d 1231, 1238 (6th Cir.), *cert. denied*, 434 U.S. 872, and *cert. denied*, 434 U.S. 1016 (1977). We do not reach the second prong, for we conclude that there was no variance between the indictment and the proofs.

"Whether single or multiple conspiracies have been shown is usually a question of fact to be resolved by the jury . . . and [is] to be considered on appeal in the light most favorable to the government." *Grunsfeld*, 558 F.2d at 1238. Viewed in this light, the evidence allows a fair inference that all three transactions were part of one overarching conspiracy to import heroin from Thailand to the United States, with Marian Lampkin as the central character. Wilson testified at trial that, prior to the "San Francisco deal," Lampkin told him that a woman roommate who had been working for her had been caught and given a ten-year sentence, apparently referring to Anne Lewis and the "Washington, D.C. deal." Lampkin's continued position as the procurer of couriers in the United States and the contact between those couriers and the Thai couriers was shown by her recruitment of Wilson for the "San Francisco deal" and her activities in Thailand which led the Thai couriers to contact Wilson. Furthermore, in the "Los Angeles deal," Wilson was again contacted by trans-Pacific couriers who had received his telephone number from Lampkin.

Although the enterprise engaged in three separate transactions, and the cast of characters changed over the course of the enterprise, this does not mean that there was not one conspiracy linking all three deals. "The unity esssential to a conspiracy is derived from the assent of its members to contribute to a common enterprise. Seemingly independent trans-

actions may be revealed as parts of a single conspiracy by their place in a pattern of regularized activity involving a significant continuity of membership." *Grassi*, 616 F.2d 1303. Here, the goal of the conspiracy remained the same throughout its life — the importation and distribution of heroin. Lampkins' role also remained the same through all three deals. Wilson acted as the American courier in both the "San Franciso deal" and the "Los Angeles deal,"taking the place of the incarcerated courier Lewis. Although the procedure for exchanging money for heroin changed from a single transaction to a consignment arrangement between the first and second deals, the rest of the operation functioned in essentially the same way, with trans-Pacific couriers contacting the American courier who had been recruited by Lampkin. Therefore, we conclude that the evidence supported a finding that a single conspiracy existed.[5]

III.

Next, Kelley argues that,if the Government indeed proved the existence of a single conspiracy, the evidence of the

[5]Kelley correctly notes that no evidence was offered to show his participation in either the "Washington, D.C. deal" or the "Los Angeles deal." However,the issue of whether acts or statements made by co-conspirators before Kelly joined the conspiracy are admissible against Kelley is controlled by the ruling of the Supreme Court in *United States v. United States Company*, 333 U.S. 364 (1948):

> With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.

333 U.S. at 393, *see also United States v. Cassity*, 631 F.2d 461, 464 (6th Cir. 1980). Similarly, because the conspiracy continued after the termination of Kelley's involvement, statements and acts of co-conspirators in furtherance of the continuing conspiracy may be introduced against him. *United States v. Mason*, 658 F.2d 1263, 1269–70 (9th Cir. 1981). Such statements are admissible despite the fact that, at the end of the "San Francisco deal" and during the "Los Angeles deal," Wilson was acting under the direction and surveillance of government agents. *United States v. Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983); *United States v. Thompson*, 533 F.2d 1006, 1010 (6th Cir.), *cert. denied*, 429 U.S. 939 (1976).

"Washington, D.C. deal" and the "Los Angeles deal" should nevertheless have been excluded because their prejudicial effect outweighted their probative value. Fed. R. Evid. 403. We do not agree.

The decision of the district court that the prejudicial effect of a particular piece of evidence is outweighted by its probative value is a matter of discretion, and may be reversed on appeal only if there was an abuse of discretion. *See United States v. Holloway*, 740 F.2d 1373, 1377 (6th Cir.) *cert. denied*, 469 U.S. 1021 (1984). Moreover, "[i]n reviewing a district court's ruling on a Rule 403 objection,we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." 740 F.2d at 1378; *United States v. Brady*, 595 F.2d 359, 361 (6th Cir. 1979), *cert. denied*, 444 U.S. 862 (1980).

The probative value of evidence concerning the "Washington, D.C. deal" and the "Los Angeles deal" is clearly found within the government's right to prove the entire scope of the conspiracy. Indeed, Kelley's primary contention here is that the prejudicial impact of the evidence outweighed *any* probative value. However, the existence of other transactions, even if large quantities of narcotics are involved, does not inexorably lead to prejudice; Kelley was, after all, being tried for his role in a major narcotics conspiracy, and we are unwilling to say that the presence of the approximately ten-and-one-half kilograms of heroin seized in the "Washington, D.C. deal" and the approximately five kilograms of heroin seized in the "Los Angeles deal" unduly prejudiced Kelley when he was directly implicated in another transaction involving eight-and-one-half kilograms of heroin.

Moreover,the record of the government's argument before the jury reflects the fact that the Assistant United States Attorney took pains to inform the jury that Kelley was not directly involved in any transactions other than the "San Francisco deal":

> The conspiracy in this case is far-reaching. The evidence shows that the Marian Lampkin organization was involved in at least three different heroin trafficking incidents. We have divided them up as the San Francisco deal, the Los Angeles deal and the Washington, D.C. deal.
>
> As you know, the San Francisco deal was the one that was in December of 1984 and that is the only one of the three deals that these two defendants were involved in and that's what the evidence shows and we have never said anything differently.
>
> What the other two deals show,the Los Angeles deal and the Washington, D.C. deal show...that the Marian Lampkin organization had a continuing pattern of importing heroin from Thailand.

Under these circumstances, the district court did not abuse its discretion.

IV.

Accordingly,for the foregoing reasons, the judgments of conviction are AFFIRMED.[6]

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[6]Kelley, in his two *pro se* briefs, raises several additional issues. Upon review, we conclude that all are without merit.

APPENDIX B

NO. 87-1262

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GEORGE KELLEY, *Defendant-Appellant*	ORDER

BEFORE: KEITH and WELLFORD, Circuit Judges, and HULL*, Chief Judge United States District Court

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

* Hon. Thomas G. Hull sitting by designation from the Eastern District of Tennessee